NO. 92-6591

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF JERRY WAYNE SEWELL, SR.

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ATTORNEY OF RECORD FOR PETITIONER, JERRY WAYNE SEWELL, SR.

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PETITIONER, JERRY
WAYNE SEWELL, SR.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in finding the applicable quantity of methamphetamine to be 17.5 kilograms for purposes of sentencing under the Federal Sentencing Guidelines when the district court included unusable, uningestible waste material in determining the quantity of the offending substance.

2. Whether the petitioner has been denied his Constitutional rights to due process under the Fifth Amendment and his right to confront his accusers under the Sixth Amendment by the Government's deliberate destruction of allegedly controlled substances and the containers thereof without accurate measurement of the quantities of the substances alleged or determination of the capacities of the containers prior to destruction to support the indictment and as required by the Federal Sentencing Guidelines.

3. Whether the district court and the Fifth Circuit erred when it was decided that the petitioner had three (3) prior convictions, thereby misapplying the Federal Sentencing Guidelines, when all of those prior convictions resulted from one criminal episode and were contained in one original indictment.

LIST OF ALL PARTIES TO PROCEEDING

A list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit whose judgement is sought to be reviewed is as follows:

United States of America	Plaintiff-Respondent
Jerry Wayne Sewell, Sr.	Defendant-Petitioner
James Edward Sherrod	Defendant
Steven Lee Sherrod	Defendant
Lonnie Jerrell Cooper	Defendant
Jerry Wayne Sewell, II	Defendant

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX TO APPENDIXES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (continued)

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Petitioner, Jerry Wayne Sewell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit affirming the conviction and sentence of the petitioner, Jerry Wayne Sewell, based upon materially unreliable information that the quantity of methamphetamine seized was 17.5 kilograms, in violation of the Defendant's constitutional right of due process and right to confront his accusers, and because the weight of the mixture included unusable waste material.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in *United States of America vs. James Edwin Sherrod*, et al, (5th Cir. June 23, 1992, not yet published; Appendix A of Jerry Wayne Sewell, Sr.) The judgment of conviction and sentence of the United States District Court for the Eastern District of Texas, Beaumont Division, appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals filed their Opinion in this matter on June 23, 1992. Jerry Wayne Sewell, Sr. and Jerry Wayne Sewell, II filed timely Petitions for Rehearing on July 6, 1992. The Court of Appeals denied the Petitions for Rehearing on August 3, 1992. (Appendix C of Jerry Wayne Sewell, Sr.) This Court's jurisdiction is invoked under the following statutes and Rule 10 of the Supreme Court:

(1) Title 28, U.S.C. Section 1254 (1);

(2) The decision of the Fifth Circuit Court of Appeals conflicts with the decisions of other United States Court of Appeals on the same matter, to-wit: *United States v. Salgado-Molina*, 967 F.2d 27, (2nd Cir. 1992); *United States v. Acosta*, 963 F.2d 551 (2nd Cir. 1992); *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991) and *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991), which hold that the term "mixture" used in the United States Sentencing Guidelines § 2D1.1 does not include unusable waste of controlled substances;

(3) The Fifth Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court and conflicts with the rationale of the decision of this Court in *Chapman v. United States*, 500 U.S. ____, 114 L.Ed.2d 524, 111 S.Ct. 1919 (1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"No person shall be ... deprived of life, liberty, or property, without due process of law..."

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES SENTENCING GUIDELINES - PART D

"SECTION 2D1.1.

Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses)

(a) Base Offenses Level (Apply the greatest):

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

* Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture of substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater."

STATEMENT OF THE CASE

The United States District Court, Eastern District of Texas, Beaumont Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

This case involves a criminal action in which the United States originally charged the Defendant-Petitioner, Jerry Wayne Sewell, Sr., along with four other defendants, with: (1) conspiracy to manufacture phenylacetone (P2P), amphetamine and methamphetamine, and (2) manufacturing phenylacetone (P2P). The original indictment of March 14, 1989 contained no allegations as to quantity of an offending substance, nor did it cite any enhanced penalty provisions under 21 U.S.C. § 841(b)(1)(A).

On May 18, 1989, the Government filed a superseding indictment alleging three (3) offenses, two (2) of which alleged enhanced penalty provisions. Count 1 of the superseding indictment charged the Petitioner, Jerry Wayne Sewell, Sr. with conspiracy to manufacture phenylacetone (P2P), amphetamine, and methamphetamine, and with possession with intent to distribute amphetamine and methamphetamine involving one (1) kilogram or more of a mixture or substance containing a detectable amount of methamphetamine. Count 2 of the superseding indictment charged the Petitioner with manufacturing phenylacetone (P2P), and Count 3 of the superseding indictment charged the Petitioner with manufacturing one (1) kilogram or more of a mixture or substance containing a detectable amount of methamphetamine.

Under 21 U.S.C. § 841(b), the quantity of the controlled substances involved determines the penalty range for violations thereof. Similarly, under the Federal Sentencing Guidelines, the quantity of the controlled substances determines the offense level for sentencing purposes (*See* Drug Quantity Table under § 2D1.1 of the Federal Sentencing Guidelines).

The evidence in this case revealed the following:

(1.) DEA agents obtained a warrant to search for drugs and a drug laboratory at a location in Orange County, Texas.

(2). The Government obtained an *ex parte* order authorizing, in advance, the destruction of any chemicals seized in a drug raid by DEA agents on that

suspected laboratory near Orange, Texas ; (Appendix F-2 of Jerry Wayne Sewell, Sr.).

(3). The Government agents presumably knew that punishment for violations under 21 U.S.C. § 841 and the Federal Sentencing Guidelines depended heavily upon the *quantity* of drugs seized;

(4). Government agents conducted a raid on the suspected drug laboratory on March 11, 1989, without bringing any measuring devices whatsoever, and seized a suspected mixture of methamphetamine. They took samples and then destroyed not only the suspected methamphetamine, but its containers as well, *without measuring* the quantities seized. (Testimony of DEA agent, Milton Shoquist, on October 18, 1989, Vol. 4, p. 190). Rather than measure the substances, they simply "estimated" the quantity of suspected methamphetamine seized (Testimony of DEA agent, Milton Shoquist, October 18, 1989, Vol. 4, p. 190), even though there were measuring devices available to them in the laboratory, including: 1) a one-quart measuring cup, 2) a 5000 milliliter beaker, and 3) an Ohaus triple-beam balance scale (2,610 gram). (Appendix F-1 of Jerry Wayne Sewell, Sr.).

(5). The Government agents completed DEA Forms 6 and 7 detailing the quantity of suspected methamphetamine seized to be 4,500 milliliters or 4,500 grams (4.5 kilograms); (Appendix F-3, F-4 of Jerry Wayne Sewell, Sr.).

(6). George W. Lester, the Government's forensic chemist, completed a DEA Clandestine Laboratory Report and concluded that the maximum capacity or the quantity of methamphetamine that the laboratory could produce was 1,500 grams; (Appendix F-5 of Jerry Wayne Sewell, Sr.).

(7). An independent contractor, selected and employed by the United States Government (Disposal Systems, Inc.), prepared a Hazardous Waste Manifest that showed the quantity of suspected methamphetamine collected and

turned over to them for destruction was 1.25 gallons (4.73 kilograms). (Defendant's Exhibit No. 8; Appendix F-6 of Jerry Wayne Sewell, Sr.). This measurement by an independent party matches perfectly the quantity of methamphetamine originally reported by the Government agents, though stated in different units (gallons rather than kilograms).

(8). The United States Attorney responded, in a brief filed July 6, 1989, to the motion of co-defendant, Lonnie Cooper, to Dismiss the Indictment, and advised the trial court that the quantity of methamphetamine seized was 4,500 grams or 4.5 kilograms; (Governments Response to Defendant Lonnie Cooper's Motion to Dismiss Indictment -Record on Appeal as to Cooper, Vol 8, pp. 166-176).

(9). The United States advised the trial court at a July, 1989 plea hearing of a co-defendant, Jack Rhodes, that the DEA forensic chemist, George Lester, would testify at Rhodes' trial that the quantity of substance involved in the conspiracy containing methamphetamine was 4.5 kilograms. (Unpublished opinion of the Fifth Circuit in *U.S. v. Rhodes*, No. 90-4538, rendered Sept. 27, 1991).

Incredibly, the DEA chemist, George W. Lester, testified at the Petitioner's trial on October 19, 1989 (seven months after the drug raid) that his earlier reports and the "estimates" made immediately following the raid were incorrect. He then testified that the correct quantity of methamphetamine seized was 17.5 kilograms - *four times as much as he had previously estimated*. The Government gave no notice to Petitioner's counsel, thereby precluding any opportunity to be effectively cross-examined, since both the suspect substances and their containers had been destroyed!

The Petitioner and his co-defendants were convicted of all three offenses with which they were charged. Using the "revised estimate" of controlled substance to be 17.5 kilograms rather than the original 4.5 kilograms, application of the Federal Sentencing Guidelines resulted in the Petitioner's sentence of 360 months in prison. (Appendix B of Jerry Wayne Sewell, Sr.)

The Petitioner, as well as the other four (4) defendants, made a timely appeal to the Fifth

Circuit Court of Appeals. The Fifth Circuit Court of Appeals affirmed the conviction and sentence of all five defendants in a written opinion entered on June 23, 1992, not yet reported. (Appendix A of Jerry Wayne Sewell, Sr.). The Fifth Circuit Court of Appeals further denied the Petitioner's Motion for Rehearing in a written opinion entered on August 3, 1992. (Appendix C of Jerry Wayne Sewell, Sr.).

REASONS FOR GRANTING WRIT

Certiorari should be granted in this case for several reasons. First, the case here presents the same issue as that raised in *Chapman v. United States*, 500 U.S. ___, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), i.e. what is the appropriate amount or "weight of a 'mixture or substance containing a detectable amount of' various controlled substances" under the Sentencing Guidelines. 111 S.Ct. 1919, 1925-26. Since the decision in *Chapman*, the Sixth, Eleventh and Second Circuits have applied this Court's interpretation of Congress' "market oriented" approach in one manner and the First, Fifth and Tenth Circuits have applied the Court's interpretation in an entirely different manner.

Secondly, the case here involves a set of facts that fit precisely into a due process concept addressed by this court, yet not specifically decided on the facts of that case. This Court suggested that, where law enforcement conduct so exceeds the bounds of fairness and due process principles, such egregious and outrageous acts would preclude the government from utilizing judicial process to pursue a conviction. This case presents such a set of facts.

Finally, the trial court clearly misinterpreted the Federal Sentencing Guidelines, and the Fifth Circuit Court of Appeals affirmed that misapplication, wherein the trial court incorrectly determined Petitioner's number of prior convictions and, based thereon, improperly sentenced him.

I. FOR SENTENCING PURPOSES, THE QUANTITY OF METHAMPHETAMINE SHOULD NOT INCLUDE UNINGESTIBLE, UNUSABLE AND UNMARKETABLE WASTE BY-PRODUCTS UNDER THE FEDERAL SENTENCING GUIDELINES

A. The Conflict

There exists among the Circuit Courts of Appeals a conflict on the issue of whether or not unusable liquid waste by-products that cannot be used, ingested or distributed should be included in the quantity of methamphetamine for sentencing purposes under the Federal Sentencing Guidelines. The Second, Sixth and Eleventh Circuits, relying upon this Honorable Court's opinion in *Chapman, supra*, have held that including such waste injects arbitrariness into sentencing, since variance in the amount of waste products may be more determinative of punishment than the amount of offending substances sought to be controlled. *United States v. Salgado-Molina*, 967 F.2d 27 (2nd Cir. 1992); *United States v. Acosta*, 963 F.2d 551 (2nd Cir. 1992); *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991); *Contra*, *United States v. Fowner*, 947 F.2d 954 (10th Cir. 1991), *cert denied* __ U.S. __, 112 S.Ct. 1998, __ L.Ed.2d __, (May 18, 1992); *United States v. Restrapo-Contreras*, 942 F.2d 96 (1st Cir. 1991); and the Fifth Circuit rationale in the Petitioner's case, *sub judice*.

B. Following *Chapman*, A Rational Approach

The Sixth, Eleventh and Second Circuits have followed the Court's "market oriented" approach when deciding issues that arise under 18 U.S.C. App.4, § 2D1.1 of the Federal Sentencing Guidelines. The Sixth Circuit decided a case where the defendants had been convicted and sentenced based upon a 4,180 gram methamphetamine mixture in a Crockpot. *United States v. Jennings, supra.* When sentencing the defendants, the trial court used the entire 4,180 grams of mixture instead of the smaller amount of methamphetamine that would have actually been produced if the chemical reaction had been allowed to finish. The appeals court there acknowledged that the plain language of the statute required that the quantity of any mixture containing a detectable amount of methamphetamine be used when sentencing, but noted that the mixture in the Crockpot

contained a small amount of methamphetamine with the remainder consisting of poisonous by-products and waste not ingestible for any purpose. The court then observed:

> It seems fortuitous, and unwarranted by the statute, to hold the defendants punishable for the entire weight of the mixture when they could have neither produced that amount of methamphetamine nor distributed the mixture containing the methamphetamine....

945 F.2d 129, 136.

The court, in remanding for re-sentencing, went on to hold:

> More importantly, using the entire weight of the contents of the Crockpot in this case would not be in keeping with the legislative intent underlying the sentencing scheme established by Congress. As *Chapman* makes clear, "Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes." If the Crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestible byproducts of its manufacture.

Id. at 137.

The Eleventh Circuit also reversed and remanded a case for re-sentencing where the trial court based a defendant's sentence on an uningestible, unusable solution of cocaine. The Eleventh Circuit noted that the Statutory Mission of the Federal Sentencing Guidelines was to create a "uniform and rational" scheme of sentencing that achieved the basic purpose of "just punishment." The court recognized that use of unusable mixtures when applying the Sentencing Guidelines could lead to wide variances in sentences designed to punish similar actions when considering the "marketable" amounts of drugs involved. The court stated:

> Although it is logical to base sentences upon the gross weight of usable mixtures, it is fundamentally absurd to give an individual a more severe sentence for a mixture which is unusable and not ready for retail or wholesale distribution while persons with usable mixtures would receive far less severe sentences....

938 F.2d 1231, 1237.

The Government in the Petitioner's case clearly recognized the poisonous, toxic nature of the ingredients since they had, prior to the raid on the laboratory, obtained from the United States

Magistrate authorization to destroy any precursor chemicals, specifically describing them as volatile and toxic. (Appendix F-2 of Jerry Wayne Sewell, Sr.). Additionally, the DEA agents released the drugs, precursor chemicals and laboratory equipment to a toxic disposal company to be destroyed because the materials were "contaminated." (Testimony of DEA Agent, Milton Shoquist, at trial on October 18, 1989, Vol. 4, pp. 137-38). The Government admitted throughout the trial and the ensuing appeal that the mixture here contained chemicals "*not apt to be distributed in that state*." (Appellee's Brief, p.47, emphasis added). That places this case squarely within the ambit of *Salgado-Molina*, *Acosta*, *Jennings* and *Rolande-Gabriel*, *supra*. All of those cases followed this Court's "market oriented" rationale in *Chapman*, *supra*, under which the amount of substance marketed or marketable determines the appropriate sentence. The Government concedes that the mixture on which it demands that sentencing be based was not marketable. It defies logic for the Government to suggest that it is following the "market oriented" approach of *Chapman*, and yet argue that the entire mixture should be used for sentencing. The entire mixture containing methamphetamine found in the raid on the bus could not be marketed and should not be the basis for sentencing any of the defendants. The appropriate amount is either the capacity of the lab or the amount of methamphetamine that could have been extracted from the mixture. The *Clandestine Laboratory Report*, as well as the testimony of the DEA chemist agreed that the capacity of the bus lab was 1500 grams. (Appendix F-5 of Jerry Wayne Sewell, Sr.) The appropriate quantity for sentencing purposes can only be that same 1500 grams, not 17,500 grams as alleged by the Government at trial. The Sixth Circuit concluded in *Jennings*, as the Fifth Circuit should have in Petitioner's case:

> Because the record is not adequately developed with respect to the contents of the Crockpot, we feel that remand is necessary in order for the district court to conduct an evidentiary hearing on this issue. If, as we suspect, the defendants are correct in their assertions as to the chemical properties of the contents of the Crockpot, it would be inappropriate for the district court to include the entire weight of the mixture for sentencing purposes. Instead, the district court would be limited to the amount of methamphetamine the defendants were capable of producing. *See*, Guidelines Manual, § 2D1.1, comment. (n.12); *United States v. Smallwood*, 920 F.2d 1231 (5th Cir.), *cert denied*, ____ U.S. ____, 111 S.Ct. 2870, 115 L.Ed.2d 1035 (1991); *United States v. Putney*, 906 F.2d 477 (9th Cir. 1990); *United States v. Evans*, 891 F.2d 686 (8th Cir. 1989), *cert denied*, ____ U.S. ____, 110 S.Ct. 2170, 109 L.Ed.2d 499 (1990). Because we believe that this conclusion is compelled by the legislative intent underlying the sentencing scheme of both the statute and the Sentencing Guidelines, we decline to follow those cases reaching an opposite conclusion.

945 F.2d 129, 137. [Emphasis added].

The Second Circuit, in *Acosta* and again in *Salgado-Molina*, also utilized this Court's rationale in *Chapman* when analyzing the sentences of defendants who possessed illicit drugs in mixture with other unmarketable, uningestible substances. Clearly and succinctly, the Second Circuit stated:

> Does the sentencing scheme require that the weight of an unusable portion of a mixture, which makes the drugs uningestible and unmarketable, be included in the overall weight calculation? We think not.

963 F.2d 551, 553.

The Government did not contest the defendants' argument that the mixtures were not ingestible or, therefore, marketable in either the *Acosta* case or the Petitioner's case,.

Following the rationale of this Court in *Chapman*, the methamphetamine mixture in the Petitioner's case could not have been marketed and, therefore, should not have been included in the quantity the court considered offensive to 21 U.S.C. § 841.

C. Another Approach

The Fifth Circuit, in following the First and Tenth Circuits, held that as long as the mixture involved contained a detectable amount of methamphetamine, the entire weight of the mixture should be included in calculating the base offense level under the Federal Sentencing Guidelines, even if the mixture contained uningestible liquid waste material. (Appendix A of Jerry Wayne Sewell, Sr., p. 22).

The Fifth Circuit opinion erroneously places importance on the location of this Court's "market oriented" analysis in the *Chapman* opinion, and attempts to draw from that location the idea that the "market oriented" analysis applies differently to LSD and methamphetamine than to cocaine and heroine. (Appendix A of Jerry Wayne Sewell, p. 21). This Court correctly perceived Congress' intent to assess punishment based on the "pure" or "actual" *marketable* product. The

intent of Congress to base punishment on the weight of either the "mixture" or the "pure" substance makes sense only if the substance considered is the *marketable* substance. This logical, rational approach is the manner in which this Court viewed the legislative intent of 21 U.S.C. § 841 when it explained, in *Chapman*::

> The current penalties for LSD distribution originated in the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986). Congress adopted a 'market oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H.R.Rep. No. 99-845, pt.1, pp. 11-12, 17 (1986). To implement that principle, Congress set mandatory minimum sentences corresponding to the weight of a 'mixture or substance containing a detectable amount of' the various controlled substances, including LSD. 21 U.S.C. §§841(b)(1)(A)(i) - (viii) and (B)(i) - (viii) ... It intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found - cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going. H.R.Rep. No. 99-845, *supra*, at pt. 1, p. 12.

114 L.Ed.2d 524, 535; 111 S.Ct. 1919, 1925.

Since the Circuits are clearly in conflict on this issue so vital to all defendants charged with offenses involving mixtures of controlled substances, this Honorable Court should grant the Petition for Writ of Certiorari to resolve that conflict. Until the Court addresses the issue here presented, the sentences of defendants convicted of offenses involving mixtures of controlled substances will depend more upon the Circuit in which they are tried than the "actual" quantity of offending substance involved.

Surely, Congress could not have intended such a fortuitous circumstance to dictate the fates of those convicted of drug offenses. The stated purposes of "just punishment" and "uniform and rational" sentencing for which the Sentencing Guidelines were passed cannot be achieved with this continuing conflict among the Circuits on this vital issue.

II. THE GOVERNMENT'S OUTRAGEOUS CONDUCT

A. The Conduct

This Court conceived that cases could arise where law enforcement officers acted in such an egregious manner that justice would bar those law enforcement officials from access to the

courts to further prosecute citizens subjected to the offensive conduct. *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973). Equitable principles form the foundation on which that concept is bottomed, and circumstances of this case demand consideration of those equitable principles.

The DEA agents in this case intentionally destroyed evidence against the Petitioner and his co-defendants in this case. While destruction of chemicals and other material following the raid of a suspected drug lab has become almost routine, concerns about the practice have been raised by some appellate courts. *United States v. Young*, 535 F.2d 484 (9th Cir. 1976); *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974). The Ninth Circuit, while accepting the practice of destroying drug materials in principle, withheld wholehearted endorsement because they recognized the tremendous potential for over-zealous officials to abuse it. They expressed these reservations succinctly when they noted:

> When there is loss or destruction of such evidence, we will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the government or (2) that he was prejudiced by the loss of the evidence...."

508 F.2d 898, 902.

Where the Ninth Circuit found such outrageous conduct, the defendant would not have to show *both* bad faith *and* prejudice, but either one would suffice for a reversal. In the Petitioner's case, *both* can be found. The bad faith can be inferred from the knowledge of the DEA agents that: 1). they knew they were going to raid a suspected drug lab (Appendix F-1), 2). the DEA agents knew that they would destroy all but a few samples of any substances confiscated (Appendix F-2), 3). they knew that any charges would have to specify a quantity of controlled substance, 4). they knew, or could reasonably anticipate, that anyone arrested would not have an opportunity to obtain independent measurements or samples of the materials or equipment seized prior to destruction (Appendix F-2), 5). the DEA agents brought no measuring equipment of any kind with them (testimony of DEA agent Milton Shoquist on October 18, 1989, Vol. 4, pp. 184-85), 6). the DEA agents knew that the primary factor in any sentence imposed would be the quantity of drugs involved, and 7). the DEA agents fortuitously found measuring equipment at the lab that was

capable of rendering precise measurements (Appendix F-4), yet they chose to "estimate" the quantities of chemicals and substances rather than measure them (testimony of DEA agent Milton Shoquist on October 18, 1989, Vol 4, p. 190). The crowning act of bad faith occurred when the Government, just prior to trial, finally took actual measurements of some containers (the original ones had been destroyed) and announced that they had erred in the defendant's favor when "estimating" the substances. They then "corrected" their estimates and calculated that *four* times the amount of controlled substance was actually found in the lab! To compound this outrageous charade, the Government measured "similar" containers, not the actual ones from the bus lab, because those had been destroyed immediately after the raid.

However, beyond the bad faith of this extreme course of conduct, there remains the prejudice that has been visited upon the Petitioner and his co-defendants due to the Government's acts. The destruction of the materials seized at the lab has deprived the Petitioner of his Sixth Amendment right to confront the witnesses against him. It also deprived him of his Fifth Amendment right to due process of law prior to deprivation of life, liberty or property.

Justice Kennedy of this august Court, while sitting on the Ninth Circuit Court of Appeals, offered in a concurring opinion this observation:

> The proper balance is that between the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice. *See United States v. Mays*, 549 F.2d 670, 677, 678 (9th Cir. 1977). In weighing the conduct of the Government, the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. Federal courts have greater authority and control over the actions of federal officers than over the officers of a state, and the nature and degree of federal participation is relevant although not dispositive. It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon the existence of a motive to harm the accused.

United States v. Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1979).

Every factor that Justice Kennedy mentioned, when weighed in the Petitioner's case, falls heavily in favor of the Petitioner.

B. The Conduct's Impact on Petitioner's Sixth Amendment Rights

The Government responded to Petitioner's Sixth Amendment claim that he was prevented from confronting the witnesses against him by stating that the Sixth Amendment applies to confronting witnesses, not physical evidence, citing *United States v. Herndon*, 536 F.2d 1027 (5th Cir. 1976). (Appellees Brief, pp. 20-21). The Government misunderstands the argument of the Petitioner. The Government cited cases involving defendant moonshiners whose stills and ingredients had been destroyed and the defendants submitted a Sixth Amendment challenge based upon that destruction. When citing cases to support their position, the Government failed to cite any case where the allegation against a defendant substantially and materially changed *after destruction of the evidence* on which the original allegation was based as occurred in the case *sub judice*. Therein lies the prejudice to the Petitioner's Sixth Amendment rights. The Sixth Amendment claim here rests not entirely upon the destruction of the material and equipment, but upon the destruction of the evidence *and* the "revised" calculations made by the Government witnesses without any opportunity of the Petitioner to challenge those "revised" estimates since the only evidence with which to confront the Government witness had been destroyed by the Government prior to "revising" the calculations.

C. The Conduct's Impact on Petitioner's Fifth Amendment Rights

The outrageous conduct outlined above also violated Petitioner's Fifth Amendment rights as well. The Government conceded that Petitioner presented a cognizable Fifth Amendment claim, but denied its merits. (Appellee's Brief, p. 21). This Court, in a series of cases, has carved out a guarantee of access to evidence for every defendant. *Brady v. Maryland*, 373 U.S. 83 (1960); *Giglio v. United States*, 405 U.S. 150 (1972); *California v. Trombetta*, 467 U.S. 479 (1984). *Trombetta* addressed the issue of evidence that has not been preserved and states the test for materiality of that evidence. The evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of a nature that the defendant would be unable to obtain

comparable evidence by other reasonably available means." 467 U.S. at 489. The Petitioner would be unable to obtain evidence comparable to the mixture destroyed by any reasonably available means, and certainly not in the same concentrations or amounts. That will satisfy the second requirement of *Trombetta*. At first glance, it appears that the Petitioner's claim fails the first requirement of *Trombetta* since the exculpatory value may not have been apparent before the evidence was destroyed. However, the exculpatory value of the evidence would never have existed *but for* the outrageous conduct of the Government in failing to accurately measure the materials and then, after the evidence was destroyed, "revising" the quantity estimate. The Government can argue that the exculpatory value was not apparent when they destroyed the evidence, but the evidence became exculpatory *because* of the Government conduct. There could be no comparable evidence for the Petitioner because the only evidence that could confront the Government's "revised" quantity calculations had been destroyed by the Government. This situation presents a case of first impression, wherein the Government exercises complete control over the incriminating evidence, the Government destroys the evidence after recording relevant aspects of it and then the Government "revises" the relevant aspects of the evidence with great prejudice to the defendant, knowing that there is no effective means to challenge the "revised" evidence. This type of Government conduct defies any logical interpretation of due process.

This Honorable Court declared that if the prosecution has suppressed evidence that is favorable to the defendant, the defendant has been denied due process under law and any conviction obtained in that circumstance cannot stand. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). Even if there is no bad faith or outrageous conduct as occurred in the Petitioner's case, the suppression constitutes denial of due process. This Court made that very clear in *Brady* when it said:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

10 L.Ed.2d 215, 218.

The petitioner has been denied his right to requested exculpatory evidence. Ironically, the destroyed evidence became exculpatory due to the Government's own acts, i.e. the assertion at trial that there were 17.5 kilograms of controlled substance instead of the original 4.5 kilograms. Technically, the Government has still not produced the exculpatory evidence required under *Brady*, and cannot produce it because they have destroyed it. The Government effectively takes the position that the exculpatory evidence never really existed, since the "estimates" were miscalculated, until the day before trial. The Government in this case has destroyed evidence that, at the time was not exculpatory, then re-characterized the evidence to increase the offense level which made the "original" evidence exculpatory, and now attempts to hide behind *Trombetta* and *Herndon, supra*.

D. The Conduct's Impact on Sentencing

These outrageous acts obviously affected the Fifth Amendment rights of the petitioner at trial to due process and the Sixth Amendment right to confront opposing witnesses, but the effect of the egregious conduct did not stop there. The most dramatic effect occurred during sentencing. Under the Federal Sentencing Guidelines, drug offenders receive sentences based on two factors: 1). the type of drugs involved, and 2). the quantity of the drugs. The bad faith Government conduct has destroyed the reliability of the evidence adduced at trial and used for sentencing. This Court has held that the Constitution requires sentencing to be based only upon information that is reliable and not materially false. *Roberts v. United States*, 445 U.S. 552, 63 L.Ed.2d 622, 100 S.Ct. 1358 (1980); *Townsend v. Burke*, 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948); *United States v. Weston*, 448 F.2d 626, 633 (9th Cir. 1971); *United States v. Baylin*, 696 F.2d 1030 (3rd Cir. 1982). That obviously cannot occur here in light of the patently inconsistent quantities that the Government has alleged that the defendants possessed. The DEA agents destroyed the evidence as well as its reliability, regardless of whether it was caused by failure to actually measure the quantities, or by the later allegation of extremely larger quantities.

The Government could have avoided the problem in any of several ways readily available

to them: 1). the DEA agents could have measured the quantities at the lab (with their own equipment or the numerous devices present at the lab), 2). the DEA agents could have had the disposal company perform independent measurements, since they were obviously experienced and qualified to handle the material and measure it, (indeed, this probably did occur as evidenced by the *Hazardous Waste Manifest* indicating 4,500 grams of material, *See*, Appendix F-6), 3). the Government could have relied on the estimates made at the time of the raid to prosecute the defendants rather than try to increase the stakes at trial by "recalculating" the quantities, or 4). they could have preserved the evidence until the defendant's or their counsel could have independently measured the quantities. The Government elected to do none of these to preserve the evidence against the defendants. However, they later chose to measure the capacities of "similar" containers and "adjust" their estimates of the quantity in each container to arrive at an "estimated" (*again*) quantity of drugs that was four times the previous "estimates." Continuing the "bad faith approach," the Government did this on the eve of trial, without prior notice to the defendants that a "revised quantity" would be used at trial. Such behavior required the judge to rely on mistaken, unreliable information acquired through baseless assumptions which is prohibited. *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983).

On the issue of sentencing, a particularly instructive cases arose in the Fifth Circuit prior to enactment of the Federal Sentencing Guidelines. *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984), *cert denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985).

In that case, DEA agents seized fifty-six bales of marijuana, all appearing to be approximately the same size. The DEA agents weighed a sample of twelve of the bales, all of them weighing between thirty-three (33) and thirty-eight (38) pounds. The agents also weighed three small bales that weighed about twenty-five (25) pounds each. The trial court admitted into evidence the twelve sample bales and the three smallest bales. The defendant's objected to introduction of the total weight of the marijuana, because the other bales had been destroyed. The Fifth Circuit, acknowledging *Brady*, held that due process had not been denied when the Government applied the average weight to all the seized bales to enhance the offense for sentencing

purposes and observed:

> [S]urely, if DEA agents weighed each bale before destruction on carefully calibrated scales, a similar deference to accuracy would be appropriate. While we would feel more comfortable if they had, we are convinced that the method used here to calculate the marijuana's weight was sufficiently accurate to render nugatory the exculpatory value of preservation.

750 F.2d 307, 333 [emphasis added].

The relevance of the observation made in *Webster* to the case here appears obvious because absolutely no weights or measurements were taken in the Petitioner's case. The "estimates" here remain just that, ***estimates***, and no accuracy can be attributed to either the methods used or the measurements obtained. Compounding that lack of accuracy, the Government's own witnesses made both "estimates" and came up with a 13,000 gram variation. The Fifth Circuit, in *Webster*, stated that they would have been more comfortable if the weight had been obtained "on carefully calibrated scales." yet blithely dismissed the glaring inaccuracy of the quantity in the Petitioner's case by pointing out that the same sentencing "would have resulted if the Government's final calculations had been of 5.5 kilograms of the methamphetamine mixture, merely one kilogram (of methamphetamine mixture) more than the original 'conservative' estimate." (Appendix A of Jerry Wayne Sewell, Sr., Fifth Circuit Opinion, p. 17, fn. 20). That rationale of the Fifth Circuit absolutely abrogates the purpose of the Sentencing Guidelines.

The Sentencing Guidelines separate drug offenses by quantities involved, and "merely one kilogram" more or less, can vary a offense level by a factor of 2. (Appendix A of Jerry Wayne Sewell, Sr., Fifth Circuit Opinion, p. 17, fn. 20). The Fifth Circuit saw that "merely one kilogram" could raise the offense level by 2, but failed to consider that the sentence could vary by as much as thirty-seven (37) months for a category I offender or as much as sixty-five (65) months for a category VI offender when the offense level is increased by 2. A variance in sentencing ranges of three to five years cannot be dismissed lightly as the Fifth Circuit has done here without diminishing the Constitutional due process rights of every defendant. This Court has held that due process rights do not depart with the verdict of guilty. Rather, they continue to operate all through

sentencing. *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). By ignoring the significance of "merely one kilogram," the Fifth Circuit has reinstated the arbitrariness that the Sentencing Guidelines were enacted to correct and has also denied the due process right of the Petitioner.

E. The Remedy:

The Court in *Brady* noted:

> "[S]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly...." *Id.*

The case of this Petitioner cries out for fundamental fairness. The Petitioner, although convicted, must still be treated fairly. The alternatives that would serve justice and restore Petitioner's due process rights are:

1. Dismissal of the indictment, and reversal of the conviction.

2. Reversal of the sentence and remand for re-sentencing based upon the amount of the samples taken and retained by the DEA which were introduced at trial.

3. Striking of all allegations that are based upon the quantity of the substances seized, deletion of the enhanced provisions based upon those quantities and remand to the trial court for re-sentencing based upon the maximum capacity of the lab (1500 grams). (Appendix F-5, Jerry Wayne Sewell, Sr.).

4. Striking of all allegations that are based upon the quantity of the substances seized, deletion of the enhanced provisions based upon those quantities and remand to the trial court for re-sentencing based upon the "original" estimates by the DEA agents and the quantity received by the disposal company, i.e. 4.5 kilograms. (Appendix F-5, F-6, Jerry Wayne Sewell, Sr.).

III. PRIOR CONVICTIONS BASED UPON *ONE* CRIMINAL EPISODE, *ONE* ORIGINAL INDICTMENT, AND *ONE* ARREST SHOULD BE "RELATED OFFENSES" FOR PURPOSES OF APPLICATION OF THE FEDERAL SENTENCING GUIDELINES

A. The Related Prior Convictions

The State of Texas indicted Petitioner, Jerry Wayne Sewell, Sr., in January, 1977, charging three drug-related offenses. He was arrested one time for all of the offenses related in the

single indictment. Petitioner refused a plea bargain offered by the State that would have singularly disposed of all three counts in the original indictment. Had Petitioner accepted that plea bargain instead of demanding his Constitutional right to trial, he would have had only one prior conviction and could not have been classified as a career criminal under the Sentencing Guidelines with a Level VI category. Petitioner demanded a trial and strict proof of all allegations made by the State of Texas. The State took the Petitioner to trial in Fannin County on one of the related counts charged in the indictment. Petitioner was convicted and sentenced to twenty-five years in prison.

Nearly two years later, the State of Texas again brought the petitioner to trial for the remaining offenses charged in the single original indictment. He had not been charged with any new or different offenses, nor had Petitioner been released and re-arrested. All of the State charges arose from the single original indictment. Petitioner was tried on two remaining charges and found guilty on both counts. For the second count, Petitioner received a forty-year sentence to be served consecutively with the prior twenty-five year sentence. He also received ten years for the final count on which he was tried. That sentence was to run concurrently with the forty-year sentence received. Other charges remained on the original indictment. However, Petitioner had received sixty-five years of imprisonment, the equivalent of a life sentence in Texas, and the remaining charges were dismissed.

All of the charges stemmed from one criminal episode, one indictment and one arrest. The Petitioner refused to plea bargain away his freedom and demanded strict proof of all the State's allegations. The exercise of his Constitutional and statutory rights prior to enactment of the Federal Sentencing Guidelines has resulted in a penalty to the Petitioner under those Guidelines.

B. The Sentencing Guidelines Provisions

Upon request and a "review of the record, the court of appeals shall determine whether the sentence . . . was imposed as a result of an incorrect application of the sentencing guidelines;" 18 U.S.C. 3742(e). The Sentencing Guideline most relevant to Petitioner's circumstances states that "[p]rior sentences imposed in unrelated cases are to be counted separately. Prior sentences

imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b) and (c)." 18 U.S.C. App.4, § 4A1.2(a)(2) (1990) [Federal Sentencing Guidelines in effect at sentencing (1990)]. The determination of criminal history depends heavily on the number of prior unrelated offenses for which the particular defendant has been convicted.

"A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. A career offender's criminal history category in every case shall be a Category VI." 18 U.S.C. App.4, § 4B1.1 [Federal Sentencing Guidelines]. The implications of more than one prior criminal conviction can easily be seen from the foregoing provisions of the Federal Sentencing Guidelines.

C. The Fifth Circuit Failed to Adequately Conduct a *de novo* Review of Petitioner's Sentence

The Fifth Circuit opinion *sub judice* failed to acknowledge Petitioner's complaint that he had been improperly sentenced. The prior history of convictions barely received recognition. (Appendix A of Jerry Wayne Sewell, Sr., p. 8). The written denial of Petitioner's petition for rehearing did, however, provide a little more discussion of Petitioner's contentions. When reviewing application of the Sentencing Guidelines, the court should make the determination *de novo*. *United States v. Smallwood*, 920 F.2d 1231 (5th Cir. 1991). Still, the Fifth Circuit denied the petition for rehearing based upon failure to find that the district court's sentencing was clearly erroneous. (Appendix C of Jerry Wayne Sewell, Sr.). From the language of the Fifth Circuit's denial of the petition for rehearing, it is clear that the court looked only at the conclusion of the trial court and rubber-stamped that decision. There was no *de novo* determination regarding the sentencing of the Petitioner. Indeed, the Fifth Circuit almost refused to consider the sentencing issue, giving it only a cursory discussion when denying the petition for rehearing. Perhaps the court failed to read the Reply and Response of the Petitioner to the Brief of the United States,

wherein the Petitioner set forth in great detail the facts of the prior convictions.

The Fifth Circuit appears to rely on the separation of the counts for trial and sentencing purposes and refers to *Application Note 3* of § 4A1.2 of the Sentencing Guidelines. (Appendix C, p. 4, fn. 3). *Application Note 3* provides that "prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." The Fifth Circuit appears to believe that *unless* the offenses were consolidated for trial or sentencing, they cannot be related. The Guideline note does not say that offenses are related only if they are consolidated for trial or sentencing. While a defendant may have a consolidated trial or sentencing for "related" crimes, a defendant may have a consolidated trial and/or sentencing for totally separate offenses committed over varying lengths of time and of very diverse types. The Guidelines' ambiguity in this regard leaves any possible future sentencing to the whims and vagaries of prosecutors or other fortuitous variables such as docket pressures to consolidate or separate trials and sentencing. A defendant could end up with one or several convictions dependant upon variables the defendant cannot possibly control.

The value of the sentencing guidelines supposedly exists in a *uniform and rational* scheme for sentencing and *just punishment*. Two defendants charged with similar multiple offenses may find themselves facing entirely different trial and sentencing situations that vary with the individual prosecutor, the judge to whom their case is assigned, the dockets of both of those, plea bargains made and a host of other variables over which neither defendant has any control. If both of these imaginary defendants were later charged with a felony offense and convicted in federal court, any sentencing based upon the "relatedness" guidelines would provide *no uniformity, rationality or just punishment* because it would depend upon the previously mentioned variables over which the defendants have no control. Future defendants charged with multiple offenses may have to consider waiving their rights or accepting very harsh plea bargains to avoid offending the prosecutor and facing separate trials and sentencing for any and every offense that would "up the ante" at some later date. The Sentencing Guidelines should require sentences to vary with the true

criminal history of the defendant, not some arbitrary variables that the defendant cannot control.

The Fifth Circuit recognizes that all three of Petitioner's prior offenses were for delivery of drugs, though failing to acknowledge one arrest, and still concludes that the offenses were "unrelated." The Fifth Circuit totally ignores the relatedness of offenses that are "part of a single common scheme or plan." The Fifth Circuit failed to adequately consider the issues raised by the Petitioner. Only this Court remains to address those issues and the Constitutional concerns expressed by Petitioner here.

CONCLUSION

There exists conflicts among the Circuits on the applicable quantities of controlled substances to be considered for sentencing purposes that this Court should resolve. The outrageous conduct of the Government in this particular case that violated the Petitioner's Fifth and Sixth Amendment rights should not be allowed to go uncorrected. The trial court, with the subsequent affirmation of the Fifth Circuit, affixed a sentence that does not conform to the spirit, nor the letter, of the Sentencing Guidelines, and in so doing violates Petitioner's Constitutional rights. Petitioner deserves a "just sentence" that fits the purpose of "uniformity" and "rationality."

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals in this matter.

DATED: October 29th, 1992.

Respectfully submitted,

Kent M. Adams
Attorney of Record for Petitioner.

NO._____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
OF JERRY WAYNE SEWELL, SR.

PROOF OF SERVICE

I, Kent M. Adams, do swear or declare that on the 29th day of October, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

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Signature

STATE OF TEXAS
COUNTY OF JEFFERSON

Subscribed and sworn to before me on the 29th day of October, 1992.

{Stamp}

Notary Public in and for the State of Texas